BRITISH COLUMBIA

# CONFLICT OF INTEREST COMMISSIONER

The Honourable H.A.D. OLIVER, Q.C.

# ANNUAL REPORT

# 2003

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BRITISH COLUMBIA

The Honourable Claude Richmond, MLA
Speaker of the Legislative Assembly
of British Columbia
Room 207, Parliament Buildings
Victoria, British Columbia
V8V 1X4

Mr. Speaker:

I have the honour to present the Annual Report of the Office of the Conflict of Interest Commissioner for the period January 1, 2003 to December 31, 2003.

This report is submitted pursuant to section 15 of the *Members' Conflict of Interest Act*, Chapter 287 of the Revised Statutes of British Columbia.

Yours truly,

H. A. D. Oliver
Commissioner

**Office of the Conflict of Interest Commissioner**

The Honourable H. A. D. Oliver, Q.C.
Commissioner

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# ANNUAL REPORT
# OF THE CONFLICT OF INTEREST COMMISSIONER
# 2003

## INTRODUCTION

This 11th Annual Report of the Conflict of Interest Commissioner covers the period of January 1, 2003 to December 31, 2003.

## OVERVIEW

It has been the constant endeavor of the Commissioner to encourage Members of the Legislative Assembly of British Columbia to make the fullest use of our informal confidential consultation process. The continuing decline of formal complaints and demands for investigations and inquiries, illustrates the effectiveness of this policy.

When a Member recognizes that there may be some ethical doubt about how to proceed in a given situation and comes to discuss it with the Commissioner, the Commissioner is likely to discuss a variety of approaches to the problem with a view to assisting the Member in recognizing any obstacles and pitfalls, as well as the possible impact on observant members of the public (including members of the media) of various potential courses of action.

The Conflict of Interest Commissioner provides advice and counsel to Members of Cabinet and of the Legislative Assembly either formally in writing or informally in confidential interviews. In the course of informal discussions, the Commissioner seeks to lay out on the table the various available options leaving the final decision as to the course to be selected to the Member. When a proposed course of action is illegal, the Commissioner will clearly say so. When a course is lawful but dangerous, the

Commissioner will warn, when it is legal but potentially imprudent, the Commissioner will endeavor to point that out – but the ultimate decision of whether or not to pursue an imprudent course is a political one for each individual Member.

## DIRECT PUBLIC ACCESS

Any member of the public may request the Commissioner to provide an opinion respecting alleged contravention by any Member of the *Members' Conflict of Interest Act* or section 25 of the *Constitution Act* as provided by section 19(2) of the *Members' Conflict of Interest Act* which state as follows:

> *19(2) A member of the public who has reasonable and probable grounds to believe that there has been a contravention of this Act or of section 25 of the Constitution Act may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the alleged contravention.*

## CONFLICT OF INTEREST

The term "conflict of interest" can be an abstractly complex issue. Several principles motivate our conflict of interest legislation but primarily the Act seeks to promote the integrity and impartiality of the Members of the Legislative Assembly of British Columbia. Decisions cannot be perceived as impartial and arrived at with integrity if an MLA could reasonably be seen to derive a personal benefit from decisions made or courses pursued by the Member as an elected official. The public, through this legislation, demands reassurances that all decisions made by Ministers and MLAs will be arrived at and administered fairly, objectively, and free of any personal bias. Thus, those elected officials holding public office have a **responsibility to the public trust** that must take precedence over their freedom of choice and their private interests.

The *Members' Conflict of Interest Act* defines a conflict of interest as follows:

> *Conflict of Interest*
>
> *2 (1) For the purposes of this Act, a member has a conflict of interest when the member exercises an official power or performs an official duty or function in the execution of his or her office and at the same time knows that in the performance of the duty or function or in the exercise of the power there is the opportunity to further his or her private interest.*
>
> *(2) For the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest.*

In no insignificant way, the public's trust, rather than any written legislation, reminds those elected to public office not to use their knowledge for personal gain, regardless of whether that gain is related to any activity or the personal decisions of the Member.

In the *Members' Conflict of Interest Act*, the definition of "private interest" is described as follows:

> *"private interest" does not include an interest arising from the exercise of an official power or the performance of an official duty or function that*
>
> *(a) applies to the general public,*
>
> *(b) affects a member as one of a broad class of electors, or*
>
> *(c) concerns the remuneration and benefits of a member or an officer or employee of the Legislative Assembly.*

The primary objective of our conflict of interest legislation is to enhance confidence. Unfortunately, in the current federal climate of alleged "sponsorship deals" and what to some may appear to be the reckless expenditure of taxpayers dollars, all politicians, federal, provincial or even municipal, may find themselves unfairly tarred with the same broad "lack of ethics" brush.

The *Members' Conflict of Interest Act* in British Columbia, intended to restrict certain conduct by Members of the Legislative Assembly and aimed at the avoidance of "conflict of interest", does not, of course, operate in a vacuum. The Act, standing alone, does not provide the public with any assurance of peace when it comes to the ethical motivations or principles of elected officials. The same could be said of the Canadian Criminal Code, the International Convention Against Oil Pollution, or the Ten Commandments. Each of these proscribes certain forms of conduct with which all whose behaviour is sought to be governed by it must comply, yet all these statutes, conventions and codes of conduct must be applied, interpreted and enforced.

There are two differing approaches to conflict of interest – the preventative and the punitive. As Commissioner, my constant aim is to assist Members in identifying any potential conflicts before they give rise to any offensive actions and to nip any incipient problems in the bud.

Having said that, I point out that each Member is individually responsible for arranging his or her affairs in such as way as to prevent any real, potential or apparent conflicts of interest from arising. When they are unsure as to whether there is a conflict or a perceived conflict, my office door is always open for confidential discussion.

In spite of every good intention, conflicts may all of a sudden arise. When that happens, Members are required to resolve them in favour of the public interest. There is nothing morally wrong with having a conflict of interest – it just needs to be addressed to ensure that the public's interest is met. It is in the ***knowledge*** of the existence of a conflict of interest, and a failure to address this anomaly, that the problem arises.

Section 10(1) of the *Members' Conflict of Interest Act* provides:

> *10(1) A member who has reasonable grounds to believe that he or she has a conflict of interest in a matter that is before the Legislative Assembly or the Executive Council, or a committee of either of them, must, if present at a meeting considering the matter,*

*(a) disclose the general nature of the conflict of interest, and*

*(b) withdraw from the meeting without voting or participating in the consideration of the matter.*

It follows that mere belief by a Member that he or she has a conflict requires immediate disclosure and withdrawal and a failure to comply would constitute an offence.

Section 2, "Conflict of Interest" section, merely defines conflict and apparent conflict of interest. Until a Member otherwise then provided by section 10(1) acts officially, no breach of the Conflict of Interest section arises. A **conflict of interest offence** is created by section 3:

*3 A member must not exercise an official power or perform an official duty or function if the member has a conflict of interest or an apparent conflict of interest.*

**Available Options**

All Members are required to regularly disclose to the Commissioner in a confidential disclosure statement the nature of the assets, liabilities and financial interests of the Member, the Member's spouse and minor children and private corporations controlled by any of them. If any of these financial interests are likely to be problematic for the Member, whether as a private member, a member of a committee of the Legislature or a member of Cabinet, the following options should be considered:

a) divestment of assets by sale,
b) placing of assets in a blind trust (where appropriate) with the prior approval of the Commissioner,
c) recusal (withdrawal in accordance with section 10),
d) avoidance of personal involvement by transfer of jurisdiction to another Member of the House,
e) recusal as a Minister and arranging for the matter to be dealt with by a designated alternate in Cabinet or by a Deputy Minister at the bureaucratic level.

A satisfactory step in complying with recusal and delegation described above may be seen from a typical letter approved in form by the Commissioner and sent by a Minister to his Deputy:

> *Letter of Direction – Conflict of Interest*
>
> *My obligations under the Members' Conflict of Interest Act require me to refrain from having ministerial dealings with matters that may be seen as benefiting ABC Ltd., HIJ Ltd., and QRS Ltd. To ensure that there will be no breach of the Act, I am directing you as my Deputy Minister to ensure that I have no involvement in the matters referred to above. If issues arise with respect to these companies, you should deal with those issues at the bureaucratic level. However, if they cannot be dealt with at that level because they require the exercise of Ministerial discretion, they must be brought to the attention of my back-up Minister for decision. I must not be briefed on his/her decision until after the decision has been made.*
>
> *If issues arise with respect to those companies that require consideration from Cabinet or a Cabinet Committee of which I am a member, I am directing you to advise me well in advance of any meeting where the issues will be discussed. I am to be informed of the fact that the issue is on the agenda. I must not be briefed on any of the details until after a decision is made.*

## INDEPENDENCE

The Commissioner is a totally independent Officer of the Legislative Assembly. I regard that absolute independence as indispensable to the proper functioning of conflict, ethics or integrity commissioners. In jurisdictions where such total independence was not achieved, the conflicts officer has been the subject of constant public attacks on his integrity which have tended substantially to impair that public respect for his office which is essential to its effective functioning.

## INVESTIGATING COMPLAINTS

Scrutinizing complaints against Members of the Legislative Assembly is not the only task of the Conflict of Interest Commissioner but it is certainly the one that attracts the most attention. The foundation of this office is set firmly upon the fact that any MLA, but also any member of the public, may make a formal complaint directly to the Commissioner. That complaint must be submitted in writing, make specific allegations against the Member(s), be signed and come with sufficient supporting evidence to warrant at least a preliminary assessment.

Members of the public do call or e-mail with some regularity and inquire into the process of formally making a complaint. We advise the caller on the procedure and as to whether the issue of concern is one which is likely to fall within our terms of reference or our jurisdiction. Where appropriate, we will point the caller towards a more relevant agency or source of information where a resolution to their concerns may be found. At the end of the day, however, it is for the individual concerned to decide whether or not to proceed with a formal complaint.

The number of complaints that result in a full inquiry is relatively low since many of those received fall outside the bounds of the jurisdiction conferred on the Commissioner by statute. It is perhaps noteworthy that a large number of the complaints to this office received in 2003 failed to make any specific allegations against a Member and subsequently could not be considered.

A frequent cause of complaints submitted to me concerned the way a Member had responded to a constituent's request for assistance. These constituents then write to me to complain about the Member. The complaint can involve such things as matters of policy or may reflect the view or opinion of the Member. Such complaints are outside of my terms of reference for good reason. In a parliamentary democracy, the Commissioner cannot substitute his opinion for that of the Member. A constituent who disagrees or is dissatisfied with the service his MLA has provided to him may seek some solace at the ballot box.

## DISCLOSURE STATEMENTS

A prime purpose of the *Member's Conflict of Interest Act* is to promote the utmost transparency as far as Members' private interests are concerned. The relevant portions of the Act are as follows:

*16(1) Every member must, within 60 days of being elected, and after that annually, file with the commissioner a confidential disclosure statement in the form prescribed by the regulations.*

*(2) Subject to subsection (2.1), the disclosure statement must contain*

*(a) a statement of the nature of the assets, liabilities and financial interests of the member, the member's spouse and minor children, and private corporations controlled by any of them, and*

*(b) any other information that is prescribed by the regulations to be contained in the disclosure statement.*

*(2.1) The disclosure statement of a member of the Executive Council who has complied with section 9 (1) (b) by entrusting his or her business to one or more trustees need not contain a statement of the nature of the assets, liabilities and financial interests contained in the trust.*

*(3) After filing a disclosure statement, the member, and the member's spouse if the spouse is available, must meet with the commissioner to ensure that adequate disclosure has been made and to obtain advice from the commissioner on the member's obligations under this Act, and the commissioner may recommend the manner by which the member will comply with those obligations.*

*(4) If any asset, liability or financial interest described in the disclosure statement relates to a corporation, the commissioner must ascertain whether any other corporation is an affiliate of the first named corporation, as determined under section 1 (2) to (6) of the Company Act.*

*(5) If the commissioner determines that there is an affiliate of the first named corporation, he or she must*

*(a) advise the member of the fact, in writing, and*

*(b) mention the fact in the public disclosure statement prepared under section 17.*

*(6) After filing a disclosure statement, the member must continue to disclose any material change in the assets, liabilities and financial interests of the member, the member's spouse and minor children and private corporations controlled by any of them by filing a statement of material change with the commissioner within 30 days of the material change.*

*(7) In subsection (6), **"material change"** means a material change as defined in the regulations.*

*17(1) After meeting with the member, and with the member's spouse if the spouse is available, the commissioner must prepare a public disclosure statement containing all relevant information provided by the member, and by the member's spouse if the spouse met with the commissioner, in respect of the member, the spouse and minor children, except*

*(a) the municipal address or legal description of land that is primarily for the residential or recreational use of the member or the member's spouse or minor children, and*

*(b) personal property used for transportation or for household, educational, recreational, social or aesthetic purposes.*

*(2) The public disclosure statement must contain a statement of any gifts or benefits that have been disclosed to the commissioner under section 7 (3).*

*(3) The commissioner must, as soon as is practicable, file the public disclosure statement with the Clerk of the Legislative Assembly who must*

*(a) make the statement available to any person for inspection without charge and during normal business hours, and*

*(b) provide a copy of the statement on payment of a reasonable copying charge.*

## PROSPECTIVE CANDIDATES

A provincial general election will take place in the early part of 2005 and the disclosure provisions of the statute should be studied with the greatest of care by all citizens, regardless of party, who may be considering becoming candidates in that election. A newly elected Member of the Legislative Assembly with complex financial interests may be horrified suddenly to discover that he is required to lay bare his entire financial

circumstances for inspection by the Conflict of Interest Commissioner. I once again extend to any and all prospective and potential candidates an invitation to discuss with me, should they so desire, their obligations under the *Members' Conflict of Interest Act:* early discussions of those obligations may, in some cases, lead to the rearrangement of the candidate's financial affairs and, on rare occasions, may assist a potential candidate in deciding whether he or she wishes to run for office at all.

It will be helpful to the Commissioner and to potential candidates if any such discussions can take place at the earliest possible opportunity. Potential candidates, when considering whether or not to seek a confidential consultation with the Commissioner, should bear in mind that all such informal consultations take place in the most complete confidence and that the utmost frankness will be expected and the utmost confidentiality extended by the Commissioner.

## COMPLIANCE

As stated above, there are a number of standard compliance mechanisms that typically accompany conflict of interest management, alone or in combination. These include among others:

- confidential and/or public disclosure statements,
- disposal of specific assets, withdrawal from meetings and participation in management and decision making,
- blind trusts,
- declaration of interests,
- withdrawal from participation or voting in meetings (also called recusal),
- delegation.

The sale of assets and various trust arrangements are forms of divestiture.

## PUBLIC DISCLOSURE

One of the cornerstones of the *Member's Conflict of Interest Act* is the section requiring public disclosure of Members' private interests. Originally it was felt that the simple act of disclosure itself would ensure that the public could readily see that Members were not acting improperly and would expose the full range of their financial activities. This approach placed less weight on the avoidance of conflicts in the first place and assumed knowledge and constant vigilance by the public, the media and political opponents.

It must never be seen as a cure-all – the act of disclosure of a financial matter does not allow Members to feel that they have effectively washed their hands of it.

The burden lies heavily with the Member or Minister to review their personal financial matters and bring those that might cause concern to the Commissioner's attention.

In addition to the promotion of transparency, public disclosure statements serve to promote avoidance of conflict of interest. It has been my experience that most MLAs would rather divest themselves of a conflicting asset rather than experience negative publicity.

Our current disclosure statements require Members to disclose virtually all of their holdings, assets and financial statements. With a view to reducing the volume of disclosure statements and of material change forms, I am presently considering modification of regulations which would require a Member to disclose only those assets which are controlled by the Member and which could be influenced by government actions or policy. Interests in non-self-controlled RRSPs, Members' personal residences, and various other assets that would not be impacted by government policy or actions would not need to be disclosed. The chance that these assets would cause a conflict is inherently less than with controlled assets, although continued vigilance would be required.

From time to time critical voices are raised in the media, usually in the correspondents' columns, about the rarity of findings by Conflict Commissioners of acts of misconduct by Ministers and Members of the House. Some complain that an investigation takes too long, others that an investigation took only three or four weeks and could not, therefore, have been thorough.

It has long been the practice of this office to focus on obligations of ethical conduct and disclosure rather than on prohibitions and penalties, and to encourage resolution of matters coming before it through informality, flexibility and economy of process rather than through rigid legalistic procedures. The British Columbia model in this regard appears to have developed into a national trend. It is my view after seven years as Conflicts Commissioner that these methods appear to be effective and enjoy the support of Members of the House and of the leaders, both of Government and of Opposition. I realize that it may not be good "show biz" but believe that the avoidance of political scandal is infinitely preferable to having to clean up its after effects.

The Commissioner is at all times available to discuss with Members potential problems before they develop into real problems and to assist in providing a different perspective of proposed courses of action. John Langford of UVic has suggested that guardians such as the Conflict of Interest Commissioner have been turned into arbiters of good government and that as a result the role of your elected representatives has been distorted. I see it as one of the purposes of our informal conflict consultation process to assist elected representatives in recognizing potential conflicts as soon as the earliest warning sign materializes so that ultimately the Conflict of Interest Commissioner may – to use the words of Prof. John Langford – be turned into the Maytag Repair Man.

I am appreciative to the Members and leaders of both parties for their ongoing efforts to ensure compliance not only with the letter but the spirit of the *Members' Conflict of Interest Act* and to those members of the public sufficiently interested in the political process and the protection of its integrity to bring to my attention from time to time potential breaches of that statute.

## AMENDING THE ACT

The *Members' Conflict of Interest Act* was enacted in 1990 and I believe that certain changes in the wording of the statute are worthy of consideration.

1. The Act in its present form appears to put emphasis on prohibitions and penalties conveying a negative image to the reader instead of focusing on a positive commitment to the highest standards of ethical conduct and practices. Four other provinces have a preamble or purpose clause at the start of the statute setting a positive tone from the outset. I suggest that the time has come to reconsider a similar change in this province.

2. Ethics and integrity vs. Conflict. The title of the *Members' Conflict of Interest Act* and that of the Commissioner have similarly a negative connotation. I share the view of the Honourable E.N. Hughes, O.C., Q.C., formerly Conflict of Interest Commissioner of British Columbia, and of the Yukon, presently of the Northwest Territories, that a focus on Integrity or Ethics in titles is to be preferred and that a change of the title of this office to that of Integrity Commissioner (and, if desired, of the *Members' Conflict of Interest Act* to the Members' Integrity Act) would convey the tone and purpose of the Act and of the Commissioner.

3. The maximum monetary fine of $5,000.00 which the Commissioner is able to recommend under the penalty section (section 22 of the *Act*) following an inquiry may, ten years ago, have been adequate. I would suggest that this maximum be substantially increased. The alternative penalties provided by section 22 are a reprimand, suspension for a period specified in the report and a declaration that the Member's seat be declared vacant. It is conceivable that a serious breach of the *Members' Conflict of Interest Act* might not in some cases be adequately punishable by a reprimand, and that a penalty of suspension or expulsion might unfairly penalize the innocent constituents of the offending Member by depriving them of parliamentary representation, yet the offence might require the imposition of a

substantially higher fine than the maximum presently provided. It might be thought wrong in principle that the Commissioner, finding a $5,000.00 fine insufficient in all the circumstances of a particular case, might feel compelled to recommend a period of suspension as the only legally available alternative.

4. Updating the definition of "spouse" to include the marriage-like relationship between persons of the same gender.

## BUDGET

| Fiscal Year 2003-2004 | |
|---|---|
| Annual operating budget | $292,000.00 |
| Actual expenditure | $246,000.00 |
| **Unexpended** | **$46,000.00** |

## COMMISSIONER'S STAFF

I wish to express my warm appreciation to my colleagues Betsi Curdie, Daphne Thompson and Jill Robinson who each working on a part-time basis, comprise my small but extremely effective staff. I value their unfailing dedication and am delighted to receive expressions of thanks from members of the public who have had dealings with them and who have told me that the consideration and courtesy they have received from my staff have been quite exceptional.

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